

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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JULIE SMITH,

Case No. 3:24-cv-00222-MMD-CSD

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Plaintiff,

ORDER

WALMART INC.

Defendant.

I. SUMMARY

Plaintiff Julie Smith filed a personal injury action in state court against Defendant Walmart Inc. following a slip-and-fall accident that occurred on the premises of one of Defendant's stores. (ECF No. 1-2.) Defendant removed the action to this Court. (ECF No. 1.) Before the Court is Plaintiff's motion to remand to state court (ECF No. 9 ("Motion")).¹ Because Defendant's removal was untimely—and as further explained below—the Court will grant the Motion.

II. BACKGROUND

In August 2022, Plaintiff slipped and fell on a puddle of clear liquid near the produce displays in a Walmart store in Elko, Nevada, and sustained injuries. (ECF No. 1-2 at 2.) Plaintiff's counsel sent Walmart Claims Services, Inc. a demand letter on October 18, 2023, documenting special damages of \$274,596.81 and demanding \$1.8 million to settle her claims against Defendant. (ECF No. 9-1 at 2, 7, 9.) Plaintiff filed this case against Defendant in state court on January 9, 2024. (ECF No. 1-2 at 1.) Plaintiff brought a single claim of negligence against Defendant, seeking general and special damages "in excess of \$15,000" and reasonable attorneys' fees. (*Id.* at 4.)

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¹Defendant responded (ECF No. 10), and Plaintiff replied (ECF No. 11).

1 Defendant was served with a copy of the Summons and Complaint in the state
2 court case on March 5, 2024. (ECF No. 10 at 2.) On March 26, 2024, Plaintiff mailed
3 Defendant “Plaintiff’s Initial List of Witnesses and Documents Pursuant to NRCP 16.1
4 (Plaintiff’s initial disclosures),” which noted that Plaintiff was claiming \$274,596.81 in
5 special damages. (ECF Nos. 9-2 at 6 (noting damages amount), 7 (stating that document
6 was mailed to three attorneys at the law firm Hall & Evans, LLC in Las Vegas, Nevada);
7 see also ECF No. 11-1 at 2 (indicating that a letter was mailed with cost code Elko Smith
8 Julie); ECF No. 11-2 (swearing that she mailed it to Kurt Bonds at Hall & Evans and
9 asserting that the receipt included as ECF No. 11-1 reflects that mailing).) As further
10 discussed below, Defendant contends its counsel and their staff never received this
11 document on or around March 26, 2024. (ECF No. 10-5 at 3; ECF No. 10-6 at 3; ECF No.
12 10-7 at 3; ECF No. 10-8 at 2-3; ECF No. 10-9 at 2-3.)

13 Plaintiff’s counsel Sean Rose swears that he had a telephonic Early Case
14 Conference with Defendant’s counsel Tanya Fraser on April 3, 2024, where they
15 specifically discussed Plaintiff’s initial disclosures served on March 26, 2024. (ECF No.
16 9-3 at 3.) Ms. Fraser swears that she never acknowledged receiving Plaintiff’s initial
17 disclosures during this phone call. (ECF No. 10-5 at 2.)

18 On April 18, 2024, Stacy Stallings, the officer manager at Plaintiff’s counsel’s
19 office, sent a copy of a draft joint case conference report in the state court case to
20 Defendant’s counsel for their review, asking if she could affix their signature to it and file
21 it. (ECF No. 11-3 at 4.) That draft joint case conference report stated that Plaintiff’s initial
22 disclosures had been made March 26, 2024. (ECF No. 11-4 at 4; see also ECF No. 11-2
23 at 3 (swearing she attached this document to her April 18, 2024, email).) Ms. Stallings
24 followed up again on April 29, 2024. (ECF No. 11-3 at 4.) Later that same day,
25 Defendant’s counsel Mr. Bonds forwarded Ms. Stallings’ email about reviewing the joint
26 case conference report to Cassidy Pappas, Ms. Fraser, and Omar Nagy, writing, “This
27 would be another good one for Omar. Can we get our initial disclosures out and revise
28 this jccr[.]” (*Id.* at 3.)

1 On May 3, 2024, Ms. Pappas emailed Ms. Stallings (at Plaintiff's counsel's firm)
 2 and Ms. Fraser, cc'ing Plaintiff's counsel Mr. Rose and several other people, writing, "[o]ur
 3 apologies for the delay if you have not received a response from us, however this is
 4 approved to have Tanya's signature affixed for filing." (*Id.* at 2.)

5 On May 8, 2024, the parties filed a joint case conference report in the state court
 6 case (ECF No. 10-4; see also ECF No. 11-5 (the same document)), which had Plaintiff's
 7 initial disclosures attached to it, still dated March 26, 2024, listing Plaintiff's special
 8 damages as \$274,596.81 (ECF No. 10-4 at 14). This copy of Plaintiff's initial disclosures
 9 also had the certificate of service dated March 26, 2024, attached to it as well. (*Id.* at 15.)

10 Defendant's counsel Ms. Fraser swears she never received Plaintiff's initial
 11 disclosures dated March 26, 2024, until May 13, 2024. (ECF No. 10-5 at 3.) Defendant's
 12 counsel Omar Nagy says he reviewed the joint case conference report filed May 8, 2024,
 13 on May 17, 2024, and noticed that Plaintiff's initial disclosures attached to it were dated
 14 March 26, 2024. (ECF No. 10-9 at 2.) Defendant's counsel Mr. Bonds and Patrice
 15 Stephenson-Johnson 'categorically deny' ever seeing or reviewing Plaintiff's initial
 16 disclosures dated March 26, 2024 until May 20, 2024. (ECF No. 10-7 at 3; ECF No. 10-8
 17 at 2-3.)

18 On May 24, 2024, Defendant filed a petition for removal to this Court. (ECF No. 1.)
 19 Plaintiff subsequently filed the Motion on June 11, 2024. (ECF No. 9.)

20 **III. DISCUSSION**

21 Plaintiff argues for remand because Defendant's removal was untimely;
 22 alternatively arguing that Defendants knew the amount in controversy requirement was
 23 satisfied when she filed her complaint because of her pre-litigation settlement demand or
 24 because she included her assertion that she had already suffered \$274,596.81 in special
 25 damages in her initial disclosures served March 26, 2024, and Defendant did not remove
 26 until May 24, 2024. (ECF No. 9 at 6-9.) Defendant counters that Plaintiff's prelitigation
 27 settlement demand is not admissible to prove the amount in controversy and the 30-day
 28 removal clock did not start running until May 8, 2024, when the parties filed the joint case

1 conference report in state court—and thus Defendant's May 24, 2024, removal was
2 timely. (ECF No. 10 at 5-9.) Though the Court does not entirely agree with either party's
3 arguments, the Court overall agrees that Defendant did not timely remove.

4 Federal courts are courts of limited jurisdiction, having subject-matter jurisdiction
5 only over matters authorized by the Constitution and Congress. See U.S. Const. art. III,
6 § 2, cl. 1; e.g., *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A
7 suit filed in state court may be removed by the defendant to federal court if the federal
8 court would have had original jurisdiction over the suit. See 28 U.S.C. § 1441(a).
9 However, courts “strictly construe the removal statute against removal jurisdiction,” and
10 “[f]ederal jurisdiction must be rejected if there is any doubt as to the right of removal in
11 the first instance.” *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (citations
12 omitted). “The ‘strong presumption’ against removal jurisdiction means that the defendant
13 always has the burden of establishing that removal is proper.” *Id.* (citations omitted). After
14 removal, a plaintiff may move to remand the action to state court for lack of federal
15 jurisdiction or for procedural defects. See 28 U.S.C. § 1447(c). And a “court may remand
16 for defects other than lack of subject matter jurisdiction only upon a timely motion to
17 remand.” *Smith v. Mylan Inc.*, 761 F.3d 1042, 1044 (9th Cir. 2014) (citations omitted).²

18 Defendant removed this action under 28 U.S.C. § 1332 based on diversity
19 jurisdiction. (ECF No. 1 at 3-5.) The parties do not dispute that the diversity of citizenship
20 requirement is satisfied or that the amount in controversy exceeds \$75,000. (ECF No. 9
21 at 6; ECF No. 10 at 3-4.) As noted, Plaintiff moves to remand based on untimeliness—a
22 procedural defect—of Defendant’s removal. (ECF No. 9 at 4-9.) See also *Smith*, 761 F.3d
23 at 1045 (finding the time limit requirements in the removal statute to be procedural).

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26 ²Defendant does not argue Plaintiff's Motion was untimely, but for absence of
27 doubt, Plaintiff timely filed her Motion. Defendant filed its notice of removal on May 24,
28 2024 (ECF No. 1) and Plaintiff moved to remand on June 11, 2024 (ECF No. 9), or less
than 30 days later. See *Smith*, 761 F.3d at 1044 ("A motion to remand the case on the
basis of any defect other than lack of subject matter jurisdiction must be made within 30
days after the filing of the notice of removal under section 1446(a).") (quoting § 1447(c)).

Under 28 U.S.C. § 1446(b)(3), “if the initial pleading does not indicate that the case is removable,” a defendant may file its notice of removal within 30 days after it receives “a copy of an amended pleading, motion, order or other paper from which removability may first be ascertained.” *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 885 (9th Cir. 2010) (citing 28 U.S.C. § 1446(b)(3)) (quotations omitted); see also *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1251 (9th Cir. 2006) (stating courts do not charge defendants “with notice of removability until they’ve received a paper that gives them enough information to remove”). “If the notice of removal was untimely, a plaintiff may move to remand the case back to state court.” *Carvalho*, 629 F.3d at 885 (citations omitted).

The parties agree that removability was not clear from the face of the Complaint, as Plaintiff therein alleged only general and special damages exceeding \$15,000. (ECF No. 9 at 5; ECF No. 10 at 4.) Thus, the question before the Court is when Defendant received other paper from which removability may first be ascertained. See *Carvalho*, 629 F.3d at 885.

Plaintiff’s first argument based on the prelitigation settlement demand fails to persuade for two reasons. (ECF No. 9 at 6-7.) First, the prelitigation settlement demand was mailed to Walmart Claims Services, Inc., so it did not necessarily make its way to Defendant Walmart, Inc. or Defendant’s counsel in this case, Hall & Evans, LLC. (ECF No. 9-1.) Second, and more importantly, even assuming the prelitigation settlement demand made its way to Defendant, a settlement demand that precedes the filing of the initial pleading cannot and does not constitute “other paper” that would set the 30-day removal clock running. *Kuxhausen v. BMW Fin. Servs. NA LLC*, 707 F.3d 1136, 1142 (9th Cir. 2013).³ And Plaintiff sent the settlement demand she relies on before she filed her

³The Court accordingly does not need to address Defendant’s other argument that the settlement demand is ‘inadmissible,’ but feels compelled to note that Defendant’s read of *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 (9th Cir. 2002) is incorrect. (ECF No. 10 at 5.) *Cohn* clearly states that “[a] settlement letter is relevant evidence of the amount in controversy if it appears to reflect a reasonable estimate of the plaintiff’s claim.” 281 F.3d at 840 (footnote and citation omitted). And indeed, the *Cohn* court found a demand letter

1 Complaint. (Compare ECF No. 9-1 (dated October 18, 2023) with ECF No. 1-2 at 1 (filed
 2 January 9, 2024).)

3 As to Plaintiff's second argument (ECF No. 9 at 7-9), the parties, "both admit that
 4 Plaintiff's Initial Disclosures were sufficient to put Defendant on notice of the removability
 5 of the matter" (ECF No. 10 at 6). Thus, the question is when Defendant received Plaintiff's
 6 initial disclosures. And Defendant does not meet its burden to show its removal was
 7 timely, see *Gauss* 980 F.2d at 566 (assigning Defendant the burden to show that removal
 8 was proper), because Defendant "received a paper that [gave] them enough information
 9 to remove[.]" see *Durham*, 445 F.3d at 1251, by April 18, 2024 at the latest, when Ms.
 10 Stalling sent Defendant's counsel the draft joint case conference report that undisputedly
 11 stated Plaintiff had served her initial disclosures on March 26, 2024. (ECF No. 11-3 at 4;
 12 ECF No. 11-4 at 4; see also ECF No. 11-2 at 3 (swearing she attached ECF No. 11-4 to
 13 her April 18, 2024, email).)

14 Indeed, while Defendants vigorously dispute whether they ever got the initial
 15 disclosures on or around March 26, 2024, when Plaintiff mailed them, see *supra*, they do
 16 not dispute that they got Ms. Stalling's email with the draft joint case conference report
 17 attached to it on April 18, 2024. Nor do they dispute that draft joint case conference report
 18 stated that Plaintiff filed her initial disclosures on March 26, 2024. Defendant's counsel
 19 even approved that joint case status report for filing on May 3, 2024 (ECF No. 11-3 at 2),
 20 rendering their assertion that they could not have been aware that the amount in
 21 controversy requirement was satisfied until the joint case conference report was filed on
 22 May 8, 2024, incredible.

23 In addition, Mr. Bonds emailed the draft joint case conference report to his
 24 colleagues on April 29, 2024. (*Id.* at 3.) This confirms that he received the joint case
 25 conference report containing the statement that Plaintiff filed her initial disclosures on
 26 March 26, 2024, earlier than the May 8 date Defendant relies upon in responding to the
 27

28 was sufficient to establish the amount in controversy. See *id.* Said otherwise, it is not the
 fact that it was a settlement demand letter that matters, but instead the timing of the
 demand letter.

1 motion. It is possible he is arguing he did not read Plaintiff's initial disclosures showing
2 that the amount in controversy was satisfied until either May 8 (as argued in the motion,
3 ECF No. 10 at 6-9) or May 20, 2024 (as he states in his declaration, ECF No. 10-7), but
4 the pertinent law does not ask whether he read it, it asks whether he "received a paper
5 that [gave] [him] enough information to remove[.]" See *Durham*, 445 F.3d at 1251. If he
6 or his colleagues had followed the reference to the initial disclosures in the joint case
7 status report to those disclosures, Defendant does not even dispute that they would have
8 put Defendant on notice of the case's removability. (ECF No. 10 at 6.)

9 In sum, even if Defendant did not get Plaintiff's initial disclosures on March 26,
10 2024, Defendant got a document Defendant's counsel later signed on to that should have
11 led them back to Plaintiff's initial disclosures on April 18, 2024—and thus gave them
12 enough information to remove. Defendant's petition for removal was not filed with this
13 Court until May 24, 2024, which exceeds the 30-day removal deadline. (ECF No. 1.) The
14 Court accordingly grants Plaintiff's Motion. See *Things Remembered, Inc. v. Petrarca*,
15 516 U.S. 124, 128 (1995) (stating that remand based on untimely removal is "precisely
16 the type of removal defect contemplated by § 1447(c)"); *Fristoe v. Reynolds Metals Co.*,
17 615 F.2d 1209, 1212 (9th Cir. 1980) (stating that "a timely objection to a late petition will
18 defeat removal"); *Beck v. Nationstar Mortg.*, No. 3:19-cv-00545-MMD-WGC, 2019 WL
19 5839311, at *2 (D. Nev. Nov. 6, 2019) (granting the plaintiff's motion to remand because
20 defendants' removal was untimely).

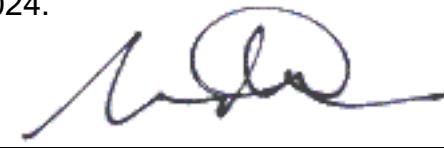
21 **IV. CONCLUSION**

22 The Court notes that the parties made several arguments and cited to several
23 cases not discussed above. The Court has reviewed these arguments and cases and
24 determines that they do not warrant discussion as they do not affect the outcome of the
25 motion before the Court.

26 It is therefore ordered that Plaintiff's motion to remand to state court (ECF No. 9)
27 is granted. This action is remanded to the Fourth Judicial District Court of Elko County,
28 Nevada.

1 The Clerk of Court is directed to close this case.
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4 DATED THIS 27th Day of September 2024.
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MIRANDA M. DU
CHIEF UNITED STATES DISTRICT JUDGE